PUBLIC PROSECUTOR

v.

SAW SENG HOO

HIGH COURT MALAYA, JOHOR BHARU
JAMES FOONG JC
[CRIMINAL TRIAL NO. 13/85]
15 AUGUST 1990

CRIMINAL PROCEDURE: *Drug trafficking - Material witnesses not called to give evidence - Whether drugs were tampered - Missing links in the chain of evidence - Whether cautioned statement made by the accused can be used to impeach the credibility of the accused - Sections 37(d), 39B(1)(a), 39(2) Dangerous Drugs Act 1952.*

The accused was charged with the offence of trafficking in dangerous drugs contrary to s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act). At the end of the prosecution's case, the Court found that the prosecution had made out a *prima facie* case and called upon the accused to make his defence.

The accused's defence was that he was "fixed" by one S whom the accused had known in 1977 and with whom the accused had been travelling with when he was arrested.

Held:

[1] Although the prosecution neglected to call 2 witnesses both of whom at one time or another had custody of the box containing the drugs and another witness who "tested" the suspected drugs at the headquarters, there was no break in the chain of evidence - *Mohd. Osman b. Pawan v. PP* distinguished.

[2] After careful consideration of the conflicting High Court authorities as to whether a cautioned statement made by the accused can be used to impeach the credit of the accused, the Court held that:

(i) under s. 37A(1) of the Act, the cautioned statement can be used to impeach the credit of the accused at the stage when the defence is called and when the accused gives evidence on oath in the witness stand;

(ii) the cautioned statement itself must be ruled admissible before it can be used;

(iii) *PP. v. Wong Yee Sen & Ors*. approved in relation to procedure of whether a cautioned statement can be used to impeach the accused's credibility.

[3] On the facts of this case, the parts underlined by the prosecution in the cautioned statement, instead of contradicting the testimony of the accused, corroborates it.

[4] After considering the testimony of the accused and all the evidence, the Court found that the accused has rebutted the presumptions under s. 37(d) of the Act relating to knowledge of the said drugs so found in the green canvas bag.

[Accused acquitted and discharged.]

Cases referred to:

Mohd. Osman bin Pawan v. Public Prosecutor [1989] 1 CLJ (Rep) 108
PP. v. Teng Chen Choi [1989] 2 CLJ (Rep) 377
PP. v. Wong Yee Sen & Others [1990] 2 CLJ (Rep) 902

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37A(1), 37(d), 39B(1)(a), (B)(2)

For the prosecution - Zambri bin Ibrahim (Deputy Public Prosecutor, Kastam dan Eksais Diraja Malaysia)
For the accused - Teh Poh Teik; M/s. Abdul Raman Saad & Associates

JUDGMENT

James Foong JC:

The accused is charged under an amended charge which reads as follows:

> That you Saw Seng Hoo @ Saw Seng Hoe on 28 October 1984 at about 6.45 a.m. along Jalan Tun Abdul Razak, Johor Bahru, in the State of Johore Darul Takzim, did traffic in Dangerous Drugs, to wit, heroin weighing a total of 1745.9 grammes in ten (10) plastic packets and you have thereby contravened the provisions of s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised Act 234/80) and punishable under s. 39B(2) of the same Act.

On 27 October 1984 at about 2.30 p.m. a Customs team headed by Customs Officer Encik Fakaruddin (PW1) kept observation at the junction of Jalan MacAlister and Lorong Selamat in Pulau Pinang. His team comprised of 4 other officers by the name of Kasri, Zahaman, Idris and Mohd. Hashim.

At this place Fakaruddin noticed a male Chinese identified as the accused alight from a red coloured car and walk towards a coffee shop by the name of Yee Loo.

The accused was seen carrying 2 bags. One a green canvas bag (P2) and the other a yellow plastic bag (P3).

Customs Officer Encik Zahaman (PW2) who was asked to observe the accused, saw the accused place the green canvas bag on a table in the said coffee shop. Not long thereafter, the accused left the coffee shop carrying only the yellow plastic bag and went off in a taxi. The green canvas bag was left on the table in the coffee shop unattended.

About 10 to 15 minutes later, the accused returned, still carrying the yellow plastic bag with him. This time he entered a nearby travel agency by the name of "Nam Ho".

At or about 3.30p.m. the accused came out of Nam Ho Travel Agency and went up a travel bus bearing Registration Number ABA 5577.

This bus was followed by PW2 on motorcycle. It crossed over to Butterworth. At the ferry jetty, PW2 joined up with Fakaruddin and his men. At Butterworth bus terminal PW2 observed the accused change into another bus which bore Registration Number WAL 107. The accused was seen taking the green bag and the yellow plastic bag out of the original bus and store these 2 bags in the luggage compartment of bus WAL 107, and thereafter the accused went on to bus WAL 107.

Bus WAL 107 with the accused therein travelled from Butterworth right down to the south of peninsular Malaysia, stopping at Simpang (near Taiping) and Slim River in Perak. At all material times this bus was trailed by Fakaruddin and his men in a motorcar.

After Slim River, Perak, Fakaruddin and his men stopped trailing the bus WAL 107 and instead proceeded straight to Johor Bahru, where according to their information the accused will be alighting as his final destination.

At Tampoi, Johor, Fakaruddin's team met up with another Customs team of the preventive section of Johor Customs headed by Customs Officer Encik Yazid Ahmad (P3).

In Tampoi, they noticed bus WAL 107 and both Customs teams in their respective cars trailed the said bus until it came to the bus stand at the Johor Bahru railway station.

Here, both the Customs teams took up positions. Yazid noticed the accused (after being pointed out to him by PW2) alighting from bus WAL 107 and proceeding to collect his bags from the luggage compartment of the said bus. He also saw the accused carrying two bags, one green canvas bag and the other a yellow plastic bag.

When the accused was walking away from the bus, Yazid proceeded towards the accused and arrested him after informing the accused of his identity.

Almost instantly Yazid heard the accused said "Depa aniaya saya". Yazid said he understood the meaning of this Penangite saying to mean "I have been fixed."

The accused was immediately handcuffed and was taken away together with the 2 bags to the Customs Office in Johor Bahru. The accused was then handed over to the IO of this case Pengarah Kanan Kastam Mr. Ong Kow Meng (PW4). Mr. Ong testified that he found the following things:

1) from the yellow plastic bag, a shirt and a pair of trousers.

2) from the green canvas bag which was locked with a very small padlock he found 10 plastic packets each suspected to contain heroin. The small padlock was forced opened by Mr. Ong with a pair of pliers.

3) from the body of the accused and some from the yellow plastic bag a number of personal items of the accused some of which have important bearing in this case. The material items are:

   (i) cash RM26 - (P7)

   (ii) 4 mental hospital visiting appointment cards (P10 1-4).

   (iii) 6 authority cards to repossess cars in the name of the accused (P12 1-6).

   (iv) 6 sets of documents of authority to repossess cars (P13 1-6).

   (v) 1 set of keys containing 6 keys (P16 1-6).

   (vi) 1 bank savings book (P17) which showed a balance of RM2.

   (vii) 1 bus ticket (P18) which had the following writing "WAL 107" "AA 5667" "Nam Ho".

After discovering the 10 packets found in the green bag to be substance suspected of drugs, Mr. Ong together with the teams and accompanied by various Customs Officers drove over to the Police Department which housed the Cawangan Anti Dadah (CAD). Here Mr. Ong borrowed a weighing scale from the CAD and after weighing the 10 plastic packets of suspected drugs he found it to exceed 4 kilograms.

Besides weighing he also requested the CAD officer to conduct tests on the suspected drugs and according to him the test results showed positive signs of heroin.

Mr. Ong, the accused and the accompanied men then returned to the Customs Office where Mr. Ong marked and labelled all the exhibits found in the green bag. He placed them in a box (P22) wrapped them with brown paper and sealed them with the Customs seal. On the

brown paper, he put the relevant reference number of the case, the name of his department and other identification marks.

As 28 October 1984 was a public holiday, Mr. Ong forwarded this sealed and wrapped up box containing the suspected drugs to Encik Daud Ali, the Chief Officer of the Preventive Section of the Customs in Johor Bahru at that material time for safe keeping. On 1 November 1984, this box was collected from Encik Daud Ali by Mr. Ong and then forwarded to the chemistry department for analysis.

The chemist (PW6) confirmed that he received the said box sealed. The seal bore "Kastam Di Raja Malaysia 27." After analysis he found the substance in the 10 plastic packets from the box to contain 1,745.9 grammes nett of heroin. He then replaced the 10 plastic packets with the original contents in the same box, wrapped it with the same brown paper which came with it. He then sealed the parcel with the "Jabatan Kimia" seal.

The said sealed parcel was collected by Mr. Ong from the chemistry department with the chemist report on 13 December 1984. This parcel was then returned to Encik Daud Ali for safe keeping until 23 December 1986 when Encik Daud Ali was transferred to Alor Star. Mr. Ong then kept this parcel under lock and key in a steel cabinet which was stored in the Customs strong room in Johor Bahru under the charge of Encik Hajar Maiden.

The reason why I proceeded at length on the facts starting from the discovery of the said drugs is because the learned Deputy Public Prosecutor neglected to call Encik Daud Ali and Encik Hajar Maiden both of whom at one time or other had custody of the box containing the drugs. Also not called after the close of the prosecution case was the Police Officer who "tested" the suspected drugs at the CAD headquarters.

The Defence Counsel seized this opportunity to submit to me that the prosecution has failed to prove a *prima facie* case and there are missing links to the chain of evidence. The Defence Counsel submitted to me the case of *Mohd. Osman v. Pendakwa Raya* [1989] 1 CLJ (Rep) 108. In that case decided by Supreme Court, there was a missing link in the chain of evidence. The officer in charge of counting the rolls of ganja was not called and there were 4 rolls of ganja missing and which could not be accounted for.

After careful consideration of the evidence, I come to the conclusion that *Mohd. Osman bin Pawan v. Public Prosecutor* can be distinguished from the present case.

In this case Mr. Ong labelled the exhibits immediately on the same day. Besides he even wrapped and sealed the box. The chemist did testify that when he received the box the custom seals were intact. After analysis the chemist resealed the box with the chemistry department seal where it was only broken in Court during the trial of this case.

I find that because of the seals and the labels of the box the drugs therein were not tempered with till date of this trial. There has been no break in the chain of evidence, though I may add that the learned Deputy Public Prosecutor should have been more prudent by calling the relevant witnesses to testify on the custody of the said box.

As for the non calling of the Police Officer from the CAD department who tested the drugs to testify, I find that crucial question on this is whether the drugs were tempered with that may alter the substantive nature of exhibits. I find that from the testimony of Mr. Ong (PW4) the test that was carried out could be what one calls a field test. There was no evidence that the test was not done in the presence of the accused and I find that such a test could

not have altered the substantive nature and the weight of the drugs so seized especially when the gross weight was over 4 kilogrammes.

After considering the aforesaid and the testimonies of the prosecution witness I find that the prosecution has made out a *prima facie* case and I called upon the accused to make his defence.

The accused testified that about 3 weeks before his arrest he ran away from the mental hospital in Penang. He had been in mental hospital before but when and for how long he could not remember.

After running away from the mental hospital he was unable to get employment since his friends were aware of his mental state.

About 6 to 7 days before his arrest he met a friend by the name of Tan Seik Teng @ Tan Ah Tang @ Seow Teng Teng whom he knew in 1977.

Seow Teng Teng as he was referred to in Court and of whom I shall in this judgment refer to as Seow, informed the accused that he may be able to assist him to secure a job and arranged to meet again.

On 27 October 1984, the accused met Seow again at the Gamma Supermarket in Penang. He got into Seow's car and was taken to Greenlane bus station. There he was told to wait while Seow went to see a friend. About 30 minutes later Seow returned in the car and picked him up. That was the first time he noticed the green canvas bag placed on the floor board of the front seat. He was told it contained Seow's clothes and that he was to go to Johor Bahru by bus. A bus ticket (P18) was given to accused by Seow. Both of them then returned to accused's house to pick up some clothes which accused put in the yellow plastic bag. The accused was then taken to Nam Ho Travel Agency to wait for the bus alone.

The accused testified that after being dropped at Nam Ho he did return home to give some money to his children which he had forgotten to do so and because the children were not at home earlier. During this trip home he went by taxi and took along only the yellow plastic bag, leaving the green canvas bag in front of the counter in Nam Ho. He also did say that he had a drink in a nearby coffee shop at the junction of MacAlister Road and Lorong Selamat.

Seow according to the accused did get on to the same bus ABA 5577 at another pick up point at Wisma Central in Pulau Pinang. Subsequently Seow was also with the accused on bus No. WAL 107 all the way from Butterworth to Johor Bahru. Seow sat in the front portion of the bus while the accused sat at the rear. The accused explained that this was because Seow was not able to get a ticket on the same bus from Nam Ho Travel Agency. Seow purchased a ticket on the same bus from another travel agency which had it's pick up point at Wisma Central. This also explained why Seow sat some distance away and got up the bus from another stop.

According to the accused, at every stop along the way down from Penang to Johor Bahru, he was with Seow and Seow paid for all the food and drinks.

When the accused was arrested and was informed of the reason for his arrest he immediately said "Depa aniaya saya" pointing at the direction of Seow who was a few yards away from him. According to the accused, the Custom Officers who arrested him paid no attention to Seow and immediately took the accused away.

After considering the testimony of the accused, and all the evidence before me, I find that the accused has rebutted the presumptions under s. 37(d) of the Dangerous Drugs Act 1952 relating to knowledge of the said drugs so found in the green canvas bag.

The accused's story coincides with the events as stated by the testimonies of other witnesses and the things found on him.

In the first instance, there were no keys to the padlock of the green canvas bag found on him. He could not have thrown it away or hidden the said keys. A body search of the accused was carried out immediately after his arrest and he could not have thrown it away since he was handcuffed and constantly under guard.

If the accused knew of the contents in the green canvas bag, he would not have left it unattended for almost 15 minutes when he returned home to give his children some money. PW2 said he saw the accused leaving the bag on a table at the coffee shop and leaving in a taxi. I think the accused's version is more probable that he left it in front of the counter of Nam Ho. Whatever the versions, the fact remains that the accused did leave the green canvas bag unattended for a substantial period of time. If one were to know the nature of the contents, bearing in mind that it had a gross weight of almost 4 kilogrammes of heroin with a substantial market value, the accused would not dare to leave it unattended. If he was a trafficker with intention he would most probably be killed by the suppliers of heroin for being careless with the valuable contents as according to the submission of the Defence Counsel.

The mental hospital visiting and appointment cards found on the accused collaborate to what he said about his mental medical history. This infers that the accused could be a person that can be utilised by traffickers to transport their illicit goods. An intelligent normal person would have asked questions but a person such as the accused would have believed in what the traffickers promised and said such as, the green canvas bag contains clothes and a promise of a job. This is especially so in the case of the accused, when he was rejected by his friends who knew of his mental history.

The accused's first reaction when arrested was to say "Depa aniaya saya." This was a simultaneous reaction unlike a statement where one has time to think. From the testimonies of the prosecution witnesses; the Custom Officers were more interested in the accused for according to their information the suspected trafficker carried a green canvas bag. They did not pay much attention to other passengers as their objective was to arrest the person who carried the green canvas bag. Therefore, I believe that when the accused said "Depa aniaya saya" and pointed towards the direction of Seow, the Customs Officers would not have paid much attention to him. PW3 admitted that the accused did utter "Depa ania saya" immediately when accused was arrested. Such being the case, I find that this instant and simultaneous reaction and utterances point towards the innocence of the accused.

The money found on the accused was only RM26. The bank account balance was even more miserable - RM2. If the accused was a trafficker there may be evidence of a substantial sum of money found on him and if not at least a fairly comprehensive sum. This I find goes to show that he was made use of as a carrier of drugs without his knowledge.

The prosecution witness has testified that the accused's behaviour was normal from the time they made observation of him to the time he was arrested. If accused knew of the true contents in the green canvas bag he would be acting more cautiously and be on a look out for the authorities all the time.

The accused testified that Seow was in the same bus all the time. According to the prosecution witnesses they only observed the accused and concentrated on him. No Customs men were on board the respective buses, the reason being, one needed to purchase a ticket in advance. After Slim River, Perak the Customs team even left the bus to proceed along its route without any observation. Between Slim River and Johor Bahru there could have been many stops and Seow could have been with the accused. Under such circumstances I find that Seow could have been on the bus with the accused all along the said journey as stated by the accused.

In this particular case, the accused did prove the existence of Seow. The National Registration Department personnel was called (DW4) to testify that under the National Registration Register there is a person by the name of Tan Siak Ting and his residence given was Pulau Pinang.

DW2, the record keeper of Penang prison was also called and he testified that there was a person called Tan Seak Teng @ Teng Teng who was in Penang prison between 1979-1984.

Besides the actual existence of Seow, what the accused testified relating to Seow being in jail between 1979-1984 was also correct. It was during this period that the accused did not get to meet Seow.

Basing on the aforesaid and judging from the demeanour of the accused during the whole period of trial and while giving evidence, I find that what the accused said is probably true and as such he has disproved the prosecution case and the presumption of knowledge under s.37(d) of the Dangerous Drugs Act 1852.

Another point that arose during this trial was when the learned Deputy Public Prosecutor applied to impeach the credit of the accused towards the end of his cross-examination of the accused, with a cautioned statement purportedly made by accused. The learned Counsel for the accused raised objections. At this stage I invited the learned Deputy Public Prosecutor and the Defence Counsel to submit to me authorities relating to this point.

In their submissions both sides agreed that up to this present time there are two conflicting High Court authorities, namely the case of;

PP. v. Teng Chen Choi [1989] 1 CLJ (Rep) 108 and *PP. v. Wong Yee Sen & Ors.* [1990] 1 MLJ 187 / [1990] 1 CLJ 325.

After careful consideration of the authorities I am of the view that the cautioned statement made by the accused can be used to impeach the credit of the accused. This is clearly stated in s. 37A(1) of the Dangerous Drugs Act 1852 which states that:

Section 37A(1) where any person is charged with any offence against this Act any statement, whether such statement amounts to a confession or not or is oral or in writing, made at any time, whether before or after such person is charged or whether in the course of a police investigation or not and whether or not wholly or partly in answer to questions, by such person to or in the hearing of any police officer of or above the rank of Inspector or any Senior Officer of Customs and whether or not interpreted to him by any other Police Officer or Senior Officer of Customs or any other person concerned or not in the arrest, shall notwithstanding anything to the contrary contained in any written law be admissible at his trial in evidence and if such person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit. (The italicised words are mine).

The only stage when accused's credit can be impeached is when defence is called and when he gives evidence on oath at the witness stand. To deprive the prosecution to use the cautioned statement for impeachment at this stage would be against the very wording of the s. 37A(1) of the Dangerous Drugs Act 1952.

However, the cautioned statement itself must be ruled admissible before it can be used. In order to determine it's admissibility a trial within a trial must be conducted.

I agree with Faiza Tamby Chik, JC (as he then was) in *PP. v. Wong Yee Sen & Ors.* [1990] 2 CLJ (Rep) 902 that before one goes to the tedious procedure of a trial within a trial to determine the admissibility of the cautioned statement, the trial Judge must be given an opportunity to study the relevant parts of the cautioned statement which purports to contradict the testimony of the accused given in Court. If there are no substantive inconsistency and material contradictions then the trial Judge can immediately rule that no impeachment proceedings need proceed beyond this point. However, if the ruling is otherwise the Court must proceed with a trial within a trial to determine the admissibility of the cautioned statement as the second stage towards impeachment proceedings of the evidence of the accused. If the cautioned statement is found to be admissible then the usual procedures for impeachment are found to be followed.

In the present case, I was surprised to find that the relevant parts underlined in yellow by the learned Deputy Public Prosecutor in the cautioned statement which was tendered to me to determine whether there are substantive and material and serious contradictions to the testimony given by the accused in Court, do not at all contradict the testimony of the accused. In fact it corroborates what he testified. I then ruled that there was no necessity to proceed further in attempting to impeach the credit of the accused.

Though I had the opportunity to study certain parts of the cautioned statement underlined in yellow by the learned Deputy Public Prosecutor, I did not consider any of those evidence therein in my final determination of this case. I am also of the view that the cautioned statement produced earlier was for the mere purpose of impeachment proceedings and since impeachment proceedings had been ruled out, I do not include the cautioned statement or any part thereof in the evidence of this case.

Standing on its own merits, the accused had given credible and reasonable explanation against the prosecution case. I therefore find the accused not guilty of the charge against him.

Also found at [1990] 2 CLJ 837